

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

KELLY LYNN DONOVAN

Plaintiff
(Responding Party)

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD
and BRYAN LARKIN

Defendants
(Moving Party)

**NOTICE OF MOTION OF THE MOVING PARTY
(returnable February 13, 2019)**

The Defendants will make a motion to a Judge, on Wednesday, February 13, 2019, at 10:00 am or as soon after that time as the motion can be heard, at 7755 Hurontario Street, Brampton, Ontario L6W 4T1.

PROPOSED METHOD OF HEARING: The motion is to be heard:

in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;

in writing as an opposed motion under subrule 37.12.1(4);

x orally.

THE MOTION IS FOR:

- (a) An Order dismissing the Plaintiff's action pursuant to Rule 21.01(3)(a) of the *Rules of Civil Procedure* on the ground that this Honourable Court has no jurisdiction over the subject matter of the action;

- (b) In the alternative, an Order striking out the Statement of Claim, without leave to amend, pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure* for failing to disclose a reasonable cause of action against the Defendants;
- (c) In the further alternative, an Order dismissing the Plaintiff's action pursuant to Rule 21.01(3)(d) of the *Rules of Civil Procedure* on the ground that the action is frivolous, vexatious and/or an abuse of the process of the Court;
- (d) In the further alternative, an Order striking out the Statement of Claim as against the personally-named Defendant, without leave to amend, on the ground that it discloses no reasonable cause of action as against the personally-named Defendant and/or the claim is frivolous, vexatious and/or an abuse of the process of the Court and/or the Court has no jurisdiction over the subject matter of the action;
- (e) In the further alternative, an Order extending the time limits to allow the Defendants to file a Statement of Defence;
- (f) If necessary, an Order abridging or extending the time for service, filing and/or delivery of the Motion Record, the Factum, the Book of Authorities and/or a Motion Confirmation;

- (g) An Order for costs of this motion, on a substantial indemnity basis, fixed and payable to the Defendants within 30 days, pursuant to Rule 57.03(1) of the *Rules of Civil Procedure*; and
- (h) Such further and other relief as counsel may advise and/or this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Overview

- (a) By Statement of Claim dated May 9, 2018, the Plaintiff, Kelly Lynn Donovan, commenced an action against the Defendants, the Waterloo Regional Police Services Board (“WRPSB”) and Bryan Larkin, Chief of Police, for breach of contract.
- (b) The Plaintiff was previously employed by the WRPSB and held the rank of Constable assigned to Administrative Command, Training Branch. The Plaintiff was represented by the Waterloo Regional Police Association (“WRPA”) in respect of her employment with and resignation from the WRPSB.
- (c) On or about June 3, 2016, the Plaintiff filed an Application with the Human Rights Tribunal of Ontario (the “Tribunal”), alleging that she was subject to discrimination on the basis of sex and marital status.

- (d) On or about June 8, 2017, the Plaintiff, the WRPSB, and the WRPA successfully negotiated a Resignation Agreement to fully and finally resolve the Plaintiff's human rights Application. Mr. Larkin executed the Resignation Agreement on behalf of the WRPSB.
- (e) Pursuant to the Resignation Agreement, the Plaintiff expressly confirmed that "she is freely and voluntarily resigning her employment with the [WRPSB] effective on or about June 25, 2017". The Plaintiff also acknowledged and agreed that her resignation decision was irrevocable.
- (f) Furthermore, the Plaintiff and the WRPSB agreed to keep the terms of the Resignation Agreement in confidence.
- (g) The Resignation Agreement also included a Full and Final Release, under which the Plaintiff agreed to release and forever discharge the WRPSB from "any and all actions, causes of action, complaints...claims...which aris[e] out of or in any way relat[e] to the matters giving rise to [her] HRTTO Application". The Plaintiff also expressly agreed that the Release could be raised as a complete bar to "any complaint against the Releasees or anyone connected with the Releasees for or by reason of any cause, matter or thing, including the matters arising out of or in any way relating to [her] HRTTO Application".
- (h) The Plaintiff claims, as pleaded in the Statement of Claim, that the Defendants breached the Resignation Agreement as Mr. Larkin swore an affidavit in defence of a class action lawsuit. Specifically, the Plaintiff

claims that the affidavit provided that an unnamed female officer had voluntarily resigned and withdrawn an Application before the Tribunal. The Plaintiff claims this disclosure contained sufficient information to identify her and, therefore, violated the confidentiality provisions of the Resignation Agreement.

The Court has no jurisdiction over the subject matter of the action

- (i) The Resignation Agreement was made in settlement of the Plaintiff's human rights Application. Pursuant to the *Code*, the Tribunal has jurisdiction to determine whether a human rights complaint has been settled and to enforce the terms of any such settlement. As such, the determination of whether the Defendants violated the Resignation Agreement falls within the exclusive jurisdiction of the Tribunal.
- (j) Alternatively, the grievance and arbitration process under the collective agreement between the WRPSB and the WRPA is the proper process and/or forum for the resolution of the Plaintiff's claims.
- (k) The Court has no jurisdiction over the subject matter of the action.

In the alternative, the Statement of Claim should be struck in its entirety, without leave to amend, on the grounds that it discloses no reasonable cause of action

- (l) The Plaintiff must, at minimum, plead the basic elements of a recognized cause of action pursuant to which an entitlement to damages is claimed.

- (m) The Plaintiff has failed to plead the necessary legal elements of the alleged breach of contract or to otherwise support the remedies claimed. The Plaintiff's allegations lack supporting facts and sufficient clarity to sustain a claim of liability or damages for breach of contract or otherwise.
- (n) The Plaintiff's claim discloses no reasonable cause of action and should be struck out pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*.

In the alternative, the action is frivolous, vexatious and/or an abuse of the process of the Court

- (o) The Plaintiff's claim is clearly unmeritorious and therefore ought to be struck out as frivolous, vexatious and/or an abuse of process.

The Claim against the personally-named Defendant should be struck

- (p) Claims made against a personally-named Defendant must be based on causes of action for which the personally-named Defendant is *personally* responsible. It is insufficient to plead that an employee committed particular acts in the course of employment. At all times, the personally-named Defendant was acting in his capacity as Chief of Police. Accordingly, the claim against him personally discloses no reasonable cause of action and/or is frivolous, vexatious and an abuse of process. Alternatively, any claim against the personally-named Defendant should be resolved through the following processes and/or forums:

- (i) the application and hearing process of the Tribunal under the provisions of the *Code*; and/or
 - (ii) the grievance and arbitration process under the collective agreement between the WRPSB and the WRPA.
- (q) The Court has no jurisdiction over the subject matter of the action as against the personally-named Defendant.

The Defendants rely on:

- (r) Rules 21.01(3)(a), 21.01(1)(b), 21.01(3)(d), and 57.03(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194;
- (s) Section 45.9 of the *Code*; and
- (t) Such further and other grounds as counsel for the Defendants may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Statement of Claim in this action issued May 9, 2018;
- (b) The Resignation Agreement;
- (c) The Affidavit of Bryan Larkin referred to in the Plaintiff's Statement of Claim; and

- (d) Such further and other evidence as counsel for the Defendants may advise and this Honourable Court may permit.

June 7, 2018

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KELLY LYNN DONOVAN
Plaintiff

and

WATERLOO REGIONAL POLICE
SERVICES BOARD and BRYAN LARKIN
Defendants

Court File No: CV-18-00001938-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at BRAMPTON

**NOTICE OF MOTION OF
THE MOVING PARTY
(RETURNABLE FEBRUARY 13, 2019)**

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